No. 10-4

IN THE

Supreme Court of the United States

GARY HOFFMAN,
Petitioner,

v.

SANDIA RESORT AND CASINO,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico

BRIEF IN OPPOSITION OF SANDIA RESORT AND CASINO TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court below properly reject Petitioner's argument that the tribal immunity doctrine should be abandoned to permit claims against tribal gaming operations where this Court has uniformly upheld tribes' immunity from suit subject to the power of Congress "to dispense with . . . or to limit" that immunity, *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991), and where Congress has already enacted a limited waiver of tribal immunity in the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A)(ii), that does not apply to this case?

2. Where the Tribal-State Class III Gaming Compact between the Pueblo of Sandia and the State of New Mexico, negotiated and approved pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(C) and New Mexico state law, provides for a limited waiver of the Pueblo's immunity from suit for visitors' claims for "bodily injury or property damage" and allows the exercise of state court jurisdiction over such claims, Compact Sec. 8, was the court below correct in holding that—following uniform decisions of the state courts of New Mexico interpreting this provision—the waiver applies only to claims of physical injury to persons or property?

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COMPACT PROVISIONS INVOLVED

SECTION 1. Purposes and Objectives.

The purpose and objectives of the State and the Tribe in making this Compact are as follows:

A. To evidence the good will and cooperative spirit between the State and the Tribe;

B. To continue the development of an effective government-to-government relationship between the State and the Tribe;

C. To provide for the regulation of Class III Gaming on Indian Lands as required by the IGRA;

D. To fulfill the purpose and intent of the IGRA by providing for tribal gaming as a means of generating tribal revenues, thereby promoting tribal economic development, tribal self-sufficiency, and strong tribal government;

E. To provide revenues to fund tribal government operations or programs, to provide for the general welfare of the tribal members and for other purposes allowed under the IGRA;

F. To provide for the effective regulation of Class III Gaming in which the Tribe shall have the sole proprietary interest and be the primary beneficiary; and

G. To address the State's interest in the establishment, by the Tribe, of rules and procedures for ensuring that Class III Gaming is conducted fairly and honestly by the owners, operators, employees and patrons of any Class III Gaming enterprise on Indian Lands.

H. To settle and resolve certain disputes that have arisen between the Tribe and the State under the provisions of the Predecessor Agreements.

SECTION 8. Protection of Visitors.

A. *Policy Concerning Protection of Visitors.* The safety and protection of visitors to a Gaming Facility is a priority of the Tribe, and it is the purpose of this Section to assure that any such persons who suffer bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation. To that end, in this Section, and subject to its terms, the Tribe agrees to carry insurance that covers

such injury or loss, agrees to a limited waiver of its immunity from suit, and agrees to proceed either in binding arbitration proceedings or in a court of competent jurisdiction, at the visitor's election, with respect to claims for bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise. For purposes of this Section, any such claim may be brought in state district court, including claims arising on tribal land, unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court.

* * *

D. *Specific Waiver of Immunity and Choice of Law.* The Tribe, by entering into this Compact and agreeing to the provisions of this section, waives its defense of sovereign immunity in connection with any claims for compensatory damages for bodily injury or property damage up to the amount of fifty million dollars ($50,000,000) per occurrence asserted as provided in this section. This is a limited waiver and does not waive the Tribe's immunity from suit for any other purpose. The Tribe shall ensure that a policy of insurance that it acquires to fulfill the requirements of this section shall include a provision under which the insurer agrees not to assert the defense of sovereign immunity on behalf of the insured, up to the limits of liability set forth in this Paragraph. The Tribe agrees that in any claim brought under the provisions of this Section, New Mexico law shall govern the substantive rights of the claimant, and shall be applied, as applicable, by the forum in which the claim is heard, except that the tribal court may but shall not be required to apply New Mexico law to a claim brought by a member of the Tribe.

INTRODUCTION

Petitioner offers no basis for this Court to review the decision of the Court of Appeals of the State of New Mexico, which rejected Petitioner's request that the court simply abandon the doctrine of tribal sovereign immunity, Pet. App. 5-6, and held that the waiver of tribal immunity for "bodily injury or property damage" claims found in Section 8 of the Tribal-State Class III Gaming Compact ("Compact") between the Pueblo of Sandia and the State of New Mexico did not apply to Petitioner's unpaid winnings claim because it did not involve physical damage to property. Pet. App. 8-16. While Petitioner asks this Court to grant review to determine whether to abrogate tribal immunity for damages claims arising from Indian gaming activities, this Court has uniformly held that "[s]uits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Congress has already enacted a limitation on tribes' immunity in the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(d)(7)(A)(ii), which section does not apply here.[1] The Court of Appeals was plainly correct in declining to abrogate tribal immunity beyond the congressionally-set limits of IGRA.

Congress in IGRA also authorized tribes and states to "enter . . . into a Tribal-State compact

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[1] Under 25 U.S.C. § 2710(d)(7)(A)(ii), states may bring suits "to enjoin a class III gaming activity located on Indian lands and conducted in violation of any [compact]." This is obviously not such a case.

governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). Under IGRA, a compact may provide for "the application of the criminal and civil laws and regulations of the Indian tribe or the State" relating to gaming activities and "the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations." *Id.* § 2710(d)(3)(C). The Pueblo and State of New Mexico entered into such a compact waiving tribal immunity for "bodily injury or property damage" claims in state court, which the Court of Appeals held applies only to claims based on physical injury to persons or property, and was therefore inapplicable to Petitioner's claim. The Court of Appeals' ruling applied settled law of the State of New Mexico, and applies only to Tribal-State Gaming compacts in New Mexico. Petitioner's disagreement with that decision provides no basis for review by this Court.

STATEMENT OF THE CASE

The Pueblo of Sandia ("Pueblo"), a federally-recognized Indian tribe, conducts Class III gaming at the Sandia Resort and Casino ("Sandia Casino"), under the terms of a Tribal-State Class III Gaming Compact ("Compact"), entered into in accordance with IGRA.[2] The Compact waives tribal immunity "for bodily injury or property damage" claims of visitors to the Sandia Casino, Compact Sec. 8.A, 8.D, permits such claims to be heard in state court, *id.*

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[2] IGRA allows only Indian tribes to conduct Class III gaming, *see* 25 U.S.C. § 2710(d)(3), and requires a Tribal-State compact for the conduct of Class III gaming by an Indian tribe. 25 U.S.C. § 2710(d)(1)(C).

Sec. 8.A,[3] and provides for the application of state law to "govern the substantive rights of the claimant." *Id.* Sec. 8.D.

Petitioner's complaint alleged that he visited Sandia Casino on August 16, 2006, and played a "Mystical Mermaid" slot machine that at some point indicated he had won $1,597,244.10. Pet. App. 4. Sandia Casino did not pay any prize money to Petitioner, however, because it determined that the machine had malfunctioned, voiding all play on the machine. *Id.* Petitioner appealed that determination to the Sandia Gaming Commission, which affirmed that Petitioner was not entitled to any of the award indicated on the machine. *Id.* Petitioner then filed suit in state district court alleging breach of contract, prima facie tort, and violation of the state Unfair Practices Act. Sandia Casino moved to dismiss the complaint, asserting that because the casino was a wholly-owned enterprise of the Pueblo, sovereign immunity barred Petitioner's suit. The district court ruled that tribal sovereign immunity applied, and granted Sandia Casino's motion to dismiss. Pet. App. 4-5.

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[3] The Compact which was in effect at all times relevant to this case was entered into in 2001. Its relevant provisions are reproduced *supra*. at 1-3. These provisions were submitted to the state district court as Exhibit 1 to Plaintiff's Response to Defendant's Motion to Dismiss, and are contained in the Record Proper ("RP") before the state court of appeals. RP 46-50. Petitioner's Appendix does not include these provisions. Instead, Petitioner has reproduced provisions of the state statutes which set forth the terms of the 1997 Compact, Pet. App. 20-26, which was superceded by the 2001 Compact. *See R&R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, 139 N.M. 85, 89-90, 128 P.3d 513, 517 (2005).

The Court of Appeals of New Mexico affirmed the state district court's decision unanimously. The court "readily dismiss[ed]" Petitioner's "argument that we should abandon sovereign immunity as a legal principle," Pet. App. 5-6 (citing *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 172 (1977); *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 7, 132 N.M. 207, 46 P.3d 668 (2002)), and then rejected Petitioner's argument that he should have been allowed to conduct discovery concerning the tribal entity status of Sandia Casino, and the malfunctioning of the machine. Pet. App. 6-8. The Court found that Petitioner had never attempted to file discovery on any issue in the case, and that his argument that he should have been allowed to conduct discovery was unsupported by authority and had therefore been waived. *Id.*[4]

The court then turned to Petitioner's argument that Section 8 of the Compact waived immunity for his unpaid winnings claim. The court first determined that Petitioner's claims were barred unless the Pueblo had waived its immunity from suit in express and unequivocal terms. *Id.* at 8-9. The court then held, relying on the New Mexico Supreme Court's decision in *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, 141 N.M. 269, 154 P.3d 644 (2007) and the Court of Appeals' decisions in *R&R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, 139 N.M. 85, 128 P.3d 513 (2005), *cert. denied*, 2006-NMCERT-2002, 139 N.M. 339, 132 P.3d 596 (2006), and *Holguin v. Tsay Corporation*, 2009-NMCA-056, 146 N.M. 346, 210

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[4] This ruling contradicts Petitioner's assertion that immunity barred inquiry into the factual issues. Pet. 18. Petitioner's suggestion that his claim sounded in fraud, *id.*, is also incorrect. *See* Pet. App. 4.

P.3d 243 (2009), that the limited waiver of tribal immunity in Section 8 of the Compact for "bodily injury or property damage" applies only to claims of physical injury to persons or property, and that Petitioner's claims "cannot be so classified." Pet. App. 16.

REASONS FOR DENYING THE PETITION

I. THE COURT BELOW PROPERLY DECLINED TO LIMIT TRIBAL IMMUNITY IN TRIBAL GAMING CASES BEYOND THE LIMITATIONS IMPOSED BY CONGRESS IN THE INDIAN GAMING REGULATORY ACT

Petitioner contends that for various policy reasons, "it would be highly beneficial for this Court" to grant review and limit the application of tribal sovereign immunity in the tribal gaming context. Pet. 10. This argument fails for two reasons.

First, this Court reaffirmed in *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), that it would defer to Congress to impose limits on tribal immunity, *id.* at 760, explaining that "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" that proposals to limit tribal immunity present. *Id.* at 759. *See also Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991), in which the Court found that "Congress has consistently reiterated its approval of the immunity doctrine," reflecting its "desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development,'" (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)), and rejected an argument that tribal sove-

reign immunity should be "construe[d] more narrowly, or abandon[ed] entirely." 498 U.S. at 510.

Second, "Congress has acted against the background of [this Court's] decisions" by "restrict[ing] tribal immunity from suit in limited circumstances," including the limited waiver set forth in IGRA at 25 U.S.C. § 2710(d)(7)(A)(ii). *Kiowa*, 523 U.S. at 758. Thus, Congress has already determined the extent to which tribal immunity should be limited with respect to Indian gaming activities. The waiver which it enacted for that purpose, 25 U.S.C. § 2710(d)(7)(A)(ii), has no application here since this is not an action brought by a State to enjoin a class III gaming activity conducted in violation of a compact.

Finally, Petitioner's reliance on two decisions which do not address tribal sovereign immunity, *Nevada v. Hicks*, 533 U.S. 353 (2002)[5] and *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007),[6] as well as an article by an "ethnographer who studied the Seminole Indians in Florida," Pet. at 4-10, provides no basis for review of this case.

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[5] In *Hicks*, the Court decided only "the question of tribal-court jurisdiction over state officers enforcing state law" while "leav[ing] open the question of tribal court jurisdiction over nonmember defendants in general." 533 U.S. at 358 n.2.

[6] In *San Manuel*, the Court of Appeals for the District of Columbia Circuit held that the National Labor Relations Act could apply to a tribe's casino, but did not address the question of whether the "tribal government may be immune from suit." 475 F.3d at 1313 (citing *Kiowa Tribe*, 523 U.S. at 754).

II. PETITIONER'S ASSERTION THAT THE DECISION OF THE COURT BELOW INCORRECTLY CONSTRUED THE LIMITED WAIVER OF THE PUEBLO'S IMMUNITY IN ITS GAMING COMPACT WITH THE STATE TURNS ON NEW MEXICO LAW AND APPLIES ONLY TO GAMING COMPACTS IN NEW MEXICO.

Acting pursuant to IGRA, 25 U.S.C. § 2710(d)(1)(C), the Pueblo of Sandia and the State of New Mexico negotiated and entered into a Tribal-State gaming compact. Section 8 of this compact waives tribal immunity for claims by visitors who suffer "bodily injury or property damage" and provides for state court jurisdiction over such claims. Compact Sec. 8.A, 8.D; Pet. App. 23.[7] The Court of Appeals rejected Petitioner's argument that this language waived tribal immunity for his unpaid winnings claim, concluding that "Section 8 of the Compact provides a limited waiver of sovereign immunity for the claims of casino patrons that are based on physical injury to

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[7] Petitioner's argument for a waiver conflates a statement taken from Section 1.G of the Compact, which provides that its "Purpose and Objectives," include that "Gaming is conducted fairly and honestly," with language taken from Section 8.A of the Compact, which Petitioner selectively quotes, implying that the waiver of immunity in Section 8 encompasses the quoted language from Section 1.G of the Compact. Pet. 13. The full sentence in Section 8.A from which Petitioner quotes rejects this implication by limiting the purpose of Section 8 as follows: "[t]he safety and protection of visitors to a Gaming Facility is a priority of the Tribe, and it is the purpose of this Section to assure that any such persons who suffer bodily injury or property damage proximately caused by the gaming conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation."

their persons or property. [Petitioner's] claims cannot be so classified." Pet. App. 16.

The Court of Appeals made clear that its ruling was based on prior decisions of the courts of the State of New Mexico. Pet. App. 11-16. These cases established that "[g]enerally 'Section 8 addresses subject matter jurisdiction over personal injury claims against the Pueblos resulting from incidents occurring on Indian land in connection with class III gaming,'" Pet. App. 11 (quoting *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, ¶ 8, 141 N.M. 269, 154 P.3d 644 (2007)), that the intent of Section 8 was to "'provide a limited waiver of sovereign immunity for purposes of providing a remedy to casino patrons who suffer *physical injury* to their persons or property,'" Pet. App 12 (quoting *R&R Deli, Inc. v. Santa Ana Star Casino*, 2006-NMCA-020, ¶ 24, 139 N.M. 85, 128 P.3d 513 (2005) (emphasis added by the Court of Appeals in this case)), and that "the words 'bodily injury' and 'property damage' in Section 8 of the Compact relate to the safety of visitors and mean—as the plain meaning of the words imply—'physical damage to . . . persons or property.'" Pet. App. 13 (quoting *Holguin v. Tsay Corp.*, 2009-NMCA-056, ¶ 11, 146 N.M. 346, 210 P.3d 243 (2009)). The court went on to reject Petitioner's claim that his claim concerned property damage, holding that Section 8 waives immunity only for claims of "physical damage to Casino patrons or their property," and that "[t]he term physical injury or damage refers literally to the physical destruction or impairment of the tangible property of a casino patron." Pet. App. 15 (citing *Holguin*, 2009-NMCA-056, ¶ 13, 146 N.M. 346, 210 P.3d 243). Petitioner's disagreement with the decision of the court below, which relies on New Mexico

law and interprets compact provisions that apply only in New Mexico, furnishes no basis for review.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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